Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

DAVID JAMES QUIGLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court's decision in Bousley v. United States, 523 U.S. 614 (1998), which determined that a defendant who had pleaded guilty could not satisfy the "cause" prong of the cause and prejudice rule by claiming that Bailey v. United States, 516 U.S. 137 (1995) was novel, applies with equal force to a defendant who had been convicted following jury trial. This question has split the Circuits and led to widely differing results.

2. Whether, as to the merits, the district and appellate courts violated the petitioner's Sixth Amendment right to a jury verdict when those courts used circumstantial evidence to reach a hypothetical jury verdict adverse to the petitioner.

3. Whether the holding of Bousley v. United States, 523 U.S. 614 (1998) applies to cases pending when Bousley was decided and/or to cases whose defining events preceded Bousley, in light of the fact that Bousley's application to those cases will produce adverse results for the criminal defendants.

4. Whether this Court should exercise its "GVR" authority and conclude that a Bousley hearing should be held to determine whether the petitioner was actually innocent and therefore entitled to an exception from the procedural default rules.

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PETITION FOR WRIT OF CERTIORARI

David James Quigley respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on December 29, 1998.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is unpublished and is reprinted in the appendix hereto ("App.") beginning at 1a. The order and opinion of the United States District Court for the Western District of Michigan are also unpublished. They are reprinted beginning at App. 8a.

JURISDICTION

The Sixth Circuit entered judgment in this case on December 29, 1998, App. 1a. The jurisdiction of the District Court was based on 18 U.S.C. §3231. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The petitioner was convicted for violating 18 U.S.C. 924(c) which is set forth at App. 27a[1]. The Sixth Amendment right to a jury trial is the Constitutional Provision upon which the petitioner relies. That Amendment is set forth at App.

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[1] The petitioner was also convicted for other crimes as set forth in his indictment. App. beginning at 15a. Only the § 924(c) conviction is relevant to this petition.

27a. The petitioner's habeas petition was brought pursuant to 28 U.S.C. 2255, which is set forth at App. 28a.

INTRODUCTION

In 1995, this Court interpreted the meaning of the word "use" as that word was used in 18 U.S.C. §924(c). Bailey v. United States, 516 U.S. 137 (1995). In 1998, this Court interpreted the meaning of the word "carry" as that word was used in the same statute. Muscarello v. United States, 524 U.S. 125 (1998). In 1998, this Court also addressed the applicability of the cause and prejudice/actual innocence exceptions in the context of a guilty plea and a forfeited Bailey claim. Bousley v. United States, 523 U.S. 614 (1998).

These three cases have spawned a flood of litigation in the lower courts. A Lexis/Shepards' computer check indicates that these three cases have been cited almost 2,000 times in the appellate courts alone. However, despite this flood of litigation, there are a number of open questions which have divided the Circuits. This petition asks the Court to consider four of those questions:

A. One of the primary holdings of Bousley v. United States, 523 U.S. 614 (1998) was that Bailey was not the type of novel decision that would constitute "cause" for not raising the issue on direct appeal.

The Circuits have since divided on the question of whether Bousley's holding regarding Bailey and cause was limited to guilty pleas or whether it also applied to cases decided by jury verdict.

The petitioner is asking this Court to grant certiorari

so that this Circuit split can be resolved. See, Sup. Ct. Rule 10(a).

B. If the procedural hurdle can be met and the Bailey-related claim is considered on the merits, this case and a number of other cases raise the issue of the authority of the appellate court to decide that a properly instructed jury would have convicted the defendant. Cf., e.g., Sullivan v. Louisiana, 508 U.S. 275 (1993) (Sixth Amendment entitles those accused of serious crimes to more than a hypothetical jury verdict). The petitioner submits that, in his case, the district and appellate courts substituted their judgment for that of a jury and refused relief using a hypothetical verdict. The petitioner further submits that this decision violated the petitioner's Sixth Amendment right to have a jury determine guilt on each element of the offense beyond a reasonable doubt.

Since this issue will likely continue to be the subject of numerous district and appellate cases, it would be appropriate to grant certiorari to provide guidance to the lower courts on these extremely important issues.

C. Bousley was decided after the instant case was fully briefed in the appellate court. The Sixth Circuit reliance upon Bousley was not apparent prior to the written decision which was rendered on December 29, 1998. App. at 1a.

The appellate cases which have cited and applied Bousley have not addressed the question of whether Bousley should be applied to pending cases, particularly when the application of the case is detrimental to the defendant.

This Court's retroactivity jurisprudence is complicated and often difficult to anticipate.

The petitioner submits that because of the extensive amount of pending litigation that would likely be affected if Bousley is applied to it, it would be appropriate to grant certiorari to decide the question of whether Bousley should be deemed prospective only or whether Bousley is applicable to all pending cases and/or to cases whose defining events preceded Bousley.

D. The final issue implicates this Court's so-called "GVR" practice. See, e.g., Lawrence v. Chater, 516 U.S. 163 (1996) (discussing this Court's "GVR" practice).

Specifically, this case is conceptually identical to Bousley with respect to the right to a hearing to show actual innocence. As in Bousley, the actual innocence question was not addressed in the lower courts. In addition, as in Bousley, the Government did not argue that the actual innocence question had been waived because it had not been raised at the district court level or on appeal.[2]

If, however, the petitioner is to be held to an actual innocence standard, as he was by the Sixth Circuit, he should be entitled to a hearing where that issue can be ventilated.

For these reasons, the petitioner is respectfully asking this Court, as an alternative remedy, to grant his petition, to vacate the decision of the Sixth Circuit, and to remand for a hearing in accordance with Bousley.

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[2] The Government's only arguments on appeal were about the scope of the Certificate of Appealability and whether the erroneous jury instruction was harmless error.

STATEMENT OF THE CASE

David James Quigley was charged in nine counts of a ten count indictment. App. beginning at 15a. The indictment charged the petitioner and two other young men with various crimes resulting from a series of pipe bomb explosions which had occurred between May and July of 1991. App. at 15a. The count at issue in this petition related to a bomb which was detonated on July 15, 1991 and which resulted in damage to a 1977 Ford station wagon van which was used to transport items to and from the Post Office. App. at 22a. The petitioner was convicted of this count and, because a destructive device was involved, he was sentenced to a mandatory minimum sentence of 30 years. 18 U.S.C. 924(c) and App. at 3a and 27a.

The evidence against the petitioner was largely circumstantial. App. at 6a. Specifically, there were no eye witnesses who testified that the petitioner had manufactured the July 15th bomb, that the petitioner had placed the bomb under the van, or that he had detonated it. App. at 6a. Rather, the evidence showed that the petitioner had been involved in other pipe bomb incidents and that he was present in the vicinity at the time that the pipe bomb at issue exploded. App. at 6a. The evidence also showed that the pipe bombs had been manufactured from materials which were readily available in retail stores and that the material used in the July 15, 1991 incident was consistent with the materials used in other incidents with which the petitioner was associated. App. at 6a. Finally, the evidence showed that the petitioner and his co-defendants had fled to Mississippi and while there had admitted that they were involved in at least some pipe bomb incidents. App. at 6a.

The instruction given to the jury with respect to the

§924(c) count was consistent with the law in the Sixth Circuit at the time, but it did not pass muster after this Court's decision in Bailey v. United States, 516 U.S. 137 (1995). App. at 5a and 29a. As a result, the petitioner filed a petition in the district court seeking habeas relief pursuant to 28 U.S.C. §2255.

App at 2a and 27a.[3]

On March 14, 1997, the district court denied the petition. App. at 8a. The district court's decision noted that the Government had conceded that the jury instruction was mistaken. App. at 11a. The district court further noted that relief need not be granted if the error was harmless. App. at 11a. The opinion noted that the jury had found the petitioner guilty of closely related counts. App. at 11a. Specifically, the petitioner was found guilty of aiding and abetting the manufacture of the destructive device, as charged in count 3 of the indictment. App. at 11a. The petitioner was also found guilty of aiding and abetting the destruction of the van, as charged in count 4 of the indictment. App. at 11a. The district court reasoned that these two convictions necessarily meant that a properly instructed jury would have found the petitioner guilty of aiding and abetting the active employment of the destructive device, as charged in count 5. App. at 11a-12a.

The district judge certified the jury instruction question for purposes of appeal. App. at 1a.

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[3] The direct appeal in this case did not raise the Bailey issue. United States v. Quigley, 30 F.3d 135 (6th Cir. 1994)(table), cert. denied, 513 U.S. 1132 (1995). App. at 38a.

On December 29, 1998, the United States Court of Appeals for the Sixth Circuit affirmed the decision to deny the petitioner's habeas petition, albeit for different reasons. App. beginning at 1a.

The Sixth Circuit cited Bousley v. United States, 523 U.S. 614 (1998), a case decided by this Court after the petition had been filed and denied and after the appeal had been fully briefed in the appellate court, for the proposition that the jury instruction claim was procedurally barred because it had not been raised on direct appeal. App. at 5a. The Sixth Circuit went on to conclude that the petitioner had shown cause for failing to raise the issue on direct appeal. App. at 5a-6a. The Court, however, denied relief because it further concluded that the petitioner had not shown actual prejudice. App. at 5a-6a.

Specifically, the Court concluded that there was sufficient evidence to show that the petitioner had actively employed the destructive device during the act of destroying the station wagon. App. at 6a. The Court pointed to the fact that the evidence showed that the petitioner was "at the scene" shortly before a bomb was detonated. App. at 6a[4]. The Court also relied on the fact that the materials used to manufacture the bomb which was detonated were similar to materials used to assemble other bombs which were more directly

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[4] The evidence specifically showed that the bomb was detonated in Marshall, Michigan and that the petitioner was in Marshall with friends prior to the explosion. "At the scene" did not mean that the petitioner was observed at the site where the bomb exploded. App. at 12a.

attributable to the petitioner.[5] App. at 6a. Finally, the Court noted that the petitioner had admitted that he had been involved in some bombings in Michigan. App. at 6a.[6]

Based upon these three factors, the Sixth Circuit concluded that "a jury would more than likely have concluded" that the petitioner had used the destructive device in the manner described by this Court in Bailey v. United States, 516 U.S. 137 (1995). App. at 6a.

The Court also concluded that the petitioner had not established actual innocence. App. at 6a. The Court pointed to the same circumstantial evidence of guilt that it considered in the prejudice analysis as being "dispositive" of the petitioner's guilt. App. at 6a. The Court also noted that the petitioner had not affirmatively provided evidence of his actual innocence. App. at 6a. The Court did not address the question of whether the actual innocence question should have been remanded to the district court for a hearing and that court's consideration. App. at 6a.

In sum, the Sixth Circuit decided that relief should be denied because "his challenge to the jury instruction is procedurally barred". App. at 6a

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[5] The evidence also showed that these materials were commonly available and could be bought at retail stores. Said another way, there was nothing unique about the materials. App. at 12a.

[6] The petitioner never admitted that he was involved in the bombing of July 15, 1991, although he did admit his involvement in other incidents, including the one which resulted in his own injury. App. at 12a.

REASONS FOR GRANTING WRIT

I. THIS CASE SQUARELY PRESENTS AN ISSUE WHICH HAS SPLIT THE CIRCUITS REGARDING WHETHER THE CAUSE ANALYSIS IN BOUSLEY v. UNITED STATES, 523 U.S. 614 (1998) APPLIES TO JURY TRIALS AS WELL AS TO GUILTY PLEAS.

Prior to this Court's decision in Bousley v. United States, 523 U.S. 614 (1998), every circuit other than the Eighth Circuit had held that this Court's decision in Bailey v. United States, 516 U.S. 137 (1995) was novel and that this novelty allowed defendants to satisfy the "cause" prong of the cause and prejudice test. See, e.g., Triestman v. United States, 124 F.3d 361 (2d Cir. 1997) (collecting cases); Stanback v. United States, 113 F.3d 651 (7th Cir. 1997) (collecting cases).

In Bousley v. United States, 523 U.S. 614 (1998), this Court held that Bailey was retroactive and that defendants who had pled guilty could raise Bailey-related claims by way of collateral attack. This Court also held, however, that Bailey was not so novel that it would allow a defendant to satisfy the cause prong of the cause and prejudice analysis. Cf., Reed v. Ross, 468 U.S. 1 (1984) (holding that if a claim was so novel that it was not reasonably available to counsel at the time of a direct appeal, such novelty would constitute cause) and Engle v. Isaac, 456 U.S. 107 (1982) (futility cannot constitute cause if an issue was merely unacceptable to a particular court at a particular time).

As a result, if a defendant had not raised a Bailey claim during his direct appeal, relief could only be obtained

if the defendant could show actual innocence.[7] Cf., Murray v. Carrier, 477 U.S. 478 (1986). This Court also held that actual innocence meant factual innocence rather than mere legal insufficiency. This Court, citing Schlup v. Delo, 513 U.S. 298 (1995), also held that the petitioner must show by clear and convincing evidence that but for the error, no reasonable jury would have found the defendant guilty.

Bousley, however, spoke only in terms of a guilty plea.[8] As this Court has held on many occasions, a guilty plea is viewed differently from a conviction resulting from a jury verdict. See, e.g., United States v. Timmreck, 441 U.S. 780 (1979) (finality concerns apply with special force to collateral attacks on guilty pleas); Mabry v. Johnson, 467 U.S. 504 (1984) (a knowing and voluntary guilty plea cannot be collaterally attacked). It was thus unclear whether this Court would make the same cause analysis regarding the novelty of Bailey if the conviction had come by way of jury verdict rather than by plea.

This lack of clarity has split the Circuits. The First, Second, Third, and Fifth Circuits have held that Bousley applies to defendants convicted by jury trial who are raising Bailey related claims by way of collateral attack. As a result, such defendants can only prevail if they can show actual innocence. The Sixth Circuit has held that Bousley only applies to guilty pleas and that, accordingly, a defendant who

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[7] As Justice Scalia's dissent in Bousley makes clear, this was the first time that the actual innocence exception to the cause and prejudice procedural bar had been applied to a guilty plea.

[8] Indeed, the majority stated that the certiorari was only granted to consider the issue in the context of a guilty plea.

has gone to trial can still show cause because of Bailey's novelty. The Tenth and D.C. Circuits have questioned but have not expressly decided whether Bousley applies to defendants convicted by juries. Both Circuits, however, applied the pre-Bousley analysis to jury trial scenarios after Bousley. The issue is open in the Fourth, Seventh[9], and Eleventh Circuits. All three circuits have applied Bousley to non-jury cases, but have yet to rule on the jury question. The issue is open as well in the Eighth and Ninth Circuits, although in each of these two circuits, there is an unpublished decision, set forth at App. 33a and 36a, which holds that Bousley applies to jury trials. Specifically:

1. Bousley applies to jury verdicts

In Brache v. United States, 165 F.3d 99 (1st Cir. 1999), the defendant was convicted of a section 924(c) charge following trial. The jury instruction given at that trial did not conform to Bailey, but the defendant did not challenge the instruction at trial or on appeal. After Bailey, the defendant sought collateral relief by filing a section 2255 petition. The First Circuit abandoned former precedent and concluded that after Bousley, the defendant's claim was procedurally barred. The Court expressed surprise at a requirement that a defendant must challenge settled law and make what might be considered frivolous claims in order to preserve a possible claim if the law changes in the future. The Court explained its rationale, however, in terms of this Court's narrowing of

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[9] In Buggs v. United States, 153 F.3d 439 (7th Cir. 1998), the Seventh Circuit had an opportunity to reach the issue, but avoided it on the ground that the Government had waived any procedural challenge by not claiming that the defendant had procedurally defaulted.

the availability of habeas by imposing more and more procedural bars to such relief.

The Court also concluded that the defendant could not establish his actual innocence given evidence that he had carried the weapon.

In DeJesus v. United States, 161 F.3d 99 (2d Cir. 1998), the defendant was convicted of a section 924(c) charge. The relevant jury instruction was improper after Bailey. The defendant had not challenged the instruction at trial or on appeal. The Second Circuit reasoned that there was no distinction between a conviction by verdict or plea with respect to the cause analysis set forth in Bousley. Accordingly, the Court felt compelled to reverse prior precedent and to require the defendant to establish actual innocence. The Court concluded that the defendant could not establish actual innocence because of unconverted trial evidence that he had possessed the weapon.

In United States v. Ramos, 147 F.3d 281 (3d Cir. 1998), the defendant was convicted by jury. The instructions did not conform to Bailey, but they were not challenged either on appeal or at trial. The Third Circuit held that Bousley applied to jury verdicts so that the defendant could not establish cause. The Court also concluded that the defendant could not show actual innocence because the uncontradicted trial evidence indicated that weapons were displayed on a table in a room where the drug transaction had taken place.

In United States v. Sorrells, 145 F.3d 744 (5th Cir. 1998), the same scenario was the basis for the section 2255 petition. The Fifth Circuit held that Bousley applied to jury trials as well as to pleas and that, as a result, a defendant could only prevail if he could show actual innocence. The

Court also ruled that the defendant could not show actual innocence. The uncontradicted trial evidence showed that the defendant's son had waved a gun and said that he would shoot anyone that came into the laboratory where methamphetamine was being made. The defendant had rented the laboratory and had provided the gun to his son. The Court held that this evidence established that the defendant was not factually innocent using an aiding and abetting theory.

2. The unreported cases holding Bousley applies to jury verdicts

As stated supra, the petitioner has located no reported decision in the Eighth or Ninth Circuits that addresses the application of the Bousley cause analysis to defendants who are collaterally attacking a jury verdict.

However, there is an unreported case, set forth in the appendix at App. 33a and 36a, from each Circuit which applies Bousley in the jury context. Both cases are very summary and do not present any real analysis in support of the decisions. Rost v. United States, 1998 U.S. App. Lexis 20144 (8th Cir. 8/17/98) and United States v. De La Cruz, 1998 U.S. App. Lexis 31875 (9th Cir. 12/17/98).

Although neither case is binding precedent, the cases further illustrate the split among the Circuits.

3. The cases differentiating jury verdicts and Bousley

The Sixth Circuit has reasoned that Bousley by its terms is limited to guilty pleas. Accordingly, that Court has continued to conclude that a defendant collaterally attacking a jury verdict can establish cause because of the solidity of the Circuit's case law on "use" prior to Bailey. See, e.g., Napier

v. United States, 159 F.3d 956 (6th Cir. 1998); Hilliard v. United States, 157 F.3d 444 (6th Cir. 1998); Fair v. United States, 157 F.3d 427 (6th Cir. 1998). This same principle was applied in the petitioner's case, and his case was resolved on the actual prejudice prong rather than upon the cause prong of the cause and prejudice exception.

In United States v. Holland, 116 F.3d 1353 (10th Cir. 1997), a pre-Bousley case, the Tenth Circuit had held that a defendant raising a collateral Bailey claim could show cause because any Bailey-related challenge would have been against the great weight of both Circuit and national authority. In United States v. McDonald, 150 F.3d 1301 (10th Cir. 1998), the defendant, who had been convicted after trial, filed a section 2255 petition arguing that his section 924(c) conviction should be vacated because the use instruction was inconsistent with Bailey.

The Tenth Circuit noted Bousley and indicated that Holland might be in doubt after Bousley. The Court, however, went on to address the merits of the defendant's claim and to hold that she was not entitled to relief because she could not show actual prejudice. Specifically, the trial evidence established that she was responsible for a gun used by a confederate during a bank robbery on an aiding and abetting theory.

Finally, in United States v. Perkins, 161 F.3d 66 (D.C. Cir. 1998), the defendant was convicted of a section 924(c) charge after trial. The jury instructions did not pass muster after Bailey. The trial evidence showed that, when confronted by police, the defendant had a handgun protruding from his waistband. The defendant fled and discarded the gun in some bushes. The gun was retrieved by the police and was the basis for the section 924(c) charge. At trial, the defendant

admitted that he was carrying the weapon, but argued that he was not carrying it in relation to a drug crime. Rather, the defendant testified that he had been shot at a short time previously and that he was carrying the weapon for his own personal protection.

The Court noted that prior to Bousley, it had used a harmless error analysis in Bailey cases. Cause was presumed. As the Tenth Circuit did in McDonald, the Court noted that its prior precedents might be in doubt after Bousley. However, the Court did not apply Bousley and used its former harmless error analysis to conclude that even if the jury instructions were erroneous as to use, the defendant did not suffer any prejudice because of the evidence and the defendant's admission about carrying the weapon.

Thus, while both the Tenth and D.C. Circuits acknowledged that Bousley might be contrary to the respective Circuit's prior precedents, both Courts declined to reach the Bousley issue and decided the cases before them based upon pre-Bousley principles.

The Petitioner believes that the Sixth Circuit and prior precedents from all but the Eighth Circuit are right and that Bousley's cause analysis should be restricted to plea cases. Specifically:

1. As noted supra, this Court has consistently treated plea cases differently from jury cases. See, e.g., United States v. Timmreck, 441 U.S. 780 (1979) and Mabry v. Johnson, 467 U.S. 504 (1984). The reasons for this different treatment include finality and the fact that a voluntary plea should not be subject to easy withdrawal.

Another reason is that the defendant who pleads guilty

must set forth a factual basis for the plea. See, e.g., United States v. Powell, 159 F.3d 500 (10th Cir. 1998). That factual basis makes it less likely that such a defendant is factually innocent. See, in this regard, Justice Scalia's dissent in Bousley.

2. By contrast, a jury trial implicates a defendant's Sixth Amendment right to have the jury determine guilt as to each element of the charged offense beyond a reasonable doubt. See, e.g., Sullivan v. Louisiana, 508 U.S. 275 (1993); Yates v. Evatt, 500 U.S. 391 (1991).

If the jury was mis-instructed, there may be serious doubt as to whether a properly instructed jury would have reached the same result. See, e.g., United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); Bollenbach v. United States, 326 U.S. 607 (1946).

However, as the cases cited supra make clear, almost all of the Bailey-related collateral attacks on jury verdicts involve situations where a defendant had not previously attacked the section 924(c) instruction because the law of the Circuit would have made such an attack frivolous. See, e.g., Brache v. United States, 165 F.3d 99 (1st Cir. 1999) (discussing pre-Bousley case law).

If Bousley applies to such defendants, then they can only prevail by showing actual innocence. See, e.g., United States v. Sorrells, 145 F.3d 744 (5th Cir. 1998).

However, as in the petitioner's case, the Courts have been reluctant to remand for an actual innocence hearing in jury verdict cases. See, e.g., Brache v. United States, 165 F.3d 99 (1st Cir. 1999) (appellate court made actual innocence determination); DeJesus v. United States, 161 F.3d

99 (2d Cir. 1998) (same); United States v. Thompson, 158 F.3d 223 (5th Cir. 1998) (same).[10]

As a result, the defendant convicted by jury trial may be unable to have his Bailey claim heard, even though no one is claiming that the jury instructions were valid after Bailey. This inability to be heard raises all of the concerns expressed by Justice Scalia in Sullivan v. Louisiana, 508 U.S. 275 (1993) regarding a defendant's right to an actual rather than to a hypothetical jury verdict. See, also, Sparf v. United States, 156 U.S. 51 (1895) and Rose v. Clark, 478 U.S. 570 (1986).

The petitioner submits that this limitation on a defendant convicted by jury would create the great risk that an innocent defendant may be unable to get a remedy and/or that a criminal defendant's Sixth Amendment rights would be abridged without an available remedy.

For these reasons, the petitioner respectfully submits that the importance of these issues and the split among the Circuits warrants a decision by this Court to grant certiorari so that the issues can be explored and the split authoritatively resolved. See, Sup. Ct. Rule 10(a)

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[10] Ironically, because of Bousley, a defendant who pleaded guilty seems to be more successful in getting such hearings than a defendant who was found guilty after trial. Cf., United States v. Sanders, 157 F.3d 392 (5th Cir. 1998) (remanding for a Bousley hearing in a guilty plea case), United States v. Benboe, 157 F.3d 1181 (9th Cir. 1998) (same), Jones v. United States, 153 F.3d 1305 (11th Cir. 1998) (same), and United States v. Hellbusch, 147 F.3d 782 (8th Cir. 1998) (same) with the cases cited in the text.

II. AS TO THE MERITS, THIS CASE RAISES AN IMPORTANT QUESTION ABOUT THE DISTRICT AND APPELLATE COURTS SUBSTITUTING THEIR JUDGMENT FOR A JURY, THUS INFRINGING UPON A CRIMINAL DEFENDANT'S SIXTH AMENDMENT RIGHTS TO A JURY VERDICT.

In Sullivan v. Louisiana, 508 U.S. 275 (1993), this Court held that the Sixth Amendment entitles those accused of serious crimes to more than a hypothetical verdict. Rather, the defendant is entitled to an actual verdict by a jury.

Sullivan also held that even overwhelming evidence cannot substitute for a jury finding of guilt beyond a reasonable doubt. See, also, United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); Bollenbach v. United States, 326 U.S. 607 (1946).

When a defendant is convicted after the jury has been given an erroneous jury instruction, the issue is whether the actual verdict was affected by the erroneous instruction. See, e.g., Sullivan v. Louisiana, 508 U.S. 275 (1993); Yates v. Evatt, 500 U.S. 391 (1991).

One issue is that since jurors are presumed to follow instructions, the jurors might have concluded that it was a waste of the jurors' time to consider other evidence which might have been considered but for the erroneous charge. See, e.g., Sandstrom v. Montana, 442 U.S. 510 (1979).

Another issue is that since one of the possible bases for conviction was found to be legally inadequate after Bailey, and since it is not possible to determine whether that legally

inadequate basis infected the verdict, it would be error not to vacate the conviction and to order a new trial. [11] See, e.g., Yates v. United States, 354 U.S. 298 (1957). Cf., Griffin v. United States, 502 U.S. 46 (1991) (discussing difference between factual and legal sufficiency, the jury's presumed ability to make factual distinctions, and the jury's presumed inability to make legal decisions).

If the rules were different, the wrong entity (such as an appellate court) could determine guilt, and directed verdicts for the Government might well be the result. See, e.g., Rose v. Clark, 478 U.S. 570 (1986); Sparf v. United States, 156 U.S. 51 (1895).

Another factor in the analysis is the nature of the evidence against the petitioner. The great majority of cases which have involved a determination by the appellate court regarding issues such as harmless error or actual innocence have also involved situations where the uncontroverted trial evidence established that the defendant could not establish error or innocence even if given a chance to do so. See, e.g., Rosario v. United States, 164 F.3d 729 (2d Cir. 1998) (two defendants admitted during the plea proceeding that they had physically carried weapons during the drug transaction and a third defendant could not escape responsibility for their actions under Pinkerton); De Jesus v. United States, 161 F.3d 99 (2d Cir. 1998) (two co-defendants were carrying weapons in the defendant's presence, and the defendant also had physical possession of the weapon during the drug crime);

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[11] The petitioner has fully served all but the mandatory 30 year sentence which resulted from the section 924(c) conviction. As a result, the section 924(c) conviction was the only conviction that was still active when the section 2255 petition was filed.

United States v. Ramos, 147 F.3d 281 (3d Cir. 1998) (evidence showed that weapons were displayed on a table in a room where the defendant was present conducting a drug transaction); United States v. Torres, 163 F.3d 909 (5th Cir. 1999) (defendant admitted to a gun and drugs which were under the seat of his car); United States v. Sorrells, 145 F.3d 744 (5th Cir. 1998) (defendant criminally liable for actual possession of gun by his son under an aiding and abetting theory); Fair v. United States, 157 F.3d 427 (6th Cir. 1998) (uncontroverted trial evidence showed that defendant carried a loaded firearm on his person); Buggs v. United States, 153 F.3d 439 (7th Cir. 1998) (defendant was seen carrying a large pistol on his person while waiting for drug shipment to arrive); United States v. McDonald, 150 F.3d 1301 (10th Cir. 1998) (evidence showed that the defendant aided and abetted the use of a firearm by a co-defendant during a bank robbery).

The difference in the instant case is that the trial evidence was circumstantial rather than direct. To find the petitioner guilty, the jury had to conclude that the similarities between other crimes and the one charged in count 5, when combined with the petitioner's presence in the general area where the bomb went off and petitioner's non-specific admissions in Mississippi established the petitioner's guilt beyond a reasonable doubt. The pre-Bailey jury instruction was so broad that it virtually compelled the verdict reached. A post-Bailey jury instruction would not necessarily compel the verdict. The jury, for example, could have concluded that the petitioner manufactured the pipe bomb but that he had nothing to do with the detonation of the bomb as charged in count 5.

This lack of direct, conclusive, and uncontroverted evidence resulted in the appellate court violating the petitioner's Sixth Amendment rights by substituting its view

of the facts for that of a jury.

The petitioner submits that this is the type of Sixth Amendment violation envisioned by this Court's prior precedents. Moreover, the volume of case law indicates that this is an important issue regularly faced by the lower courts with arguably mixed results.

For these reasons, the petitioner respectfully asks this Court to grant certiorari so that the Sixth Amendment issue can be addressed.

III. THIS CASE RAISES AN IMPORTANT ISSUE ABOUT WHETHER BOUSLEY'S CAUSE RATIONALE SHOULD BE APPLIED TO CASES WHICH ARE PENDING AND WHOSE DEFINING EVENTS PRE-DATED BOUSLEY'S INTERPRETATION OF CAUSE.

This Court's retroactivity jurisprudence is complicated and often has often resulted in decisions which have established new law and/or principles. See, e.g., Teague v. Lane, 489 U.S. 288 (1989); Solem v. Stumes, 465 U.S. 638 (1984); United States v. Johnson, 457 U.S. 537 (1984); Wainwright v. Stone, 414 U.S. 21 (1973); Griffith v. Kentucky, 479 U.S. 314 (1987).

Indeed, it was not until Bousley that this Court addressed the question of whether Bailey was retroactive.

Bousley itself did not specify whether it applied prospectively, retroactively, or to cases pending. The petitioner has reviewed all of the subsequent cases which have

cited Bousley, many of which are cited in earlier sections of this petition, and all of those cases assumed, without discussion, that Bousley, which interpreted an established rule of criminal procedure with respect to Bailey, did apply to pending cases.

In the petitioner's situation, Bousley had not been decided when the original petition was filed. It was not decided when the district court issued its decision. It was not decided when the case was briefed. It was only when the appellate opinion was issued that it became apparent that the Sixth Circuit had concluded that Bousley, decided in May of 1998, applied to the petitioner's offenses, which had taken place in 1991, and to Bailey, which had been decided in 1995.

The petitioner respectfully submits that this issue is one which should be resolved and that a decision to grant this petition would assist in the resolution to the benefit of the lower courts and the litigants.

IV. THE FACTS OF THIS CASE ARE FUNCTIONALLY IDENTICAL TO BOUSLEY, BUT THE SIXTH CIRCUIT MADE THE ACTUAL INNOCENCE DETERMINATION RATHER THAN REMANDING THE CASE TO THE DISTRICT COURT FOR A HEARING. BOUSLEY SHOULD BE APPLIED TO THE PETITIONER'S FACTS AND THIS COURT'S "GVR" PROCEDURE SHOULD BE USED TO GRANT THE PETITION, TO VACATE THE SIXTH CIRCUIT'S DECISION AND TO REMAND FOR A HEARING AT WHICH TIME THE PETITIONER COULD ATTEMPT TO PROVE ACTUAL INNOCENCE AND THE GOVERNMENT WOULD BE ABLE TO OFFER REBUTTAL EVIDENCE.

In Bousley v. United States, 523 U.S. 614 (1998), the defendant had pleaded guilty. He did not challenge the validity of his guilty plea. After Bailey, he filed a section 2255 petition, claiming that his plea was not knowing and voluntary since the elements of the section 924(c) offense had not been correctly explained to him at the time of the plea. Among other things, this Court held that since Bousley had defaulted his Bailey claim by not appealing his plea, he could only obtain relief if he could show cause and prejudice and/or actual innocence.

This Court further ruled that Bousley could not show cause because Bailey was not such a novel decision that it could not have been anticipated by Bousley's attorney.

As to actual innocence, this Court held that this term

means factual innocence rather than legal insufficiency. A petitioner must show by clear and convincing evidence that but for the error, no reasonable jury would have found him guilty, citing Schlup v. Delo, 513 U.S. 298 (1995).

The Government had not objected to the waiver claim. Accordingly, this Court decided that Bousley should be allowed to make a showing of actual innocence, even though the actual innocence claim was not raised as part of the section 2255 petition which Bousley had filed.

The facts of this case are very similar. Specifically:

1. At the time that the petition was filed, Sixth Circuit precedent indicated that the analysis focused on whether the erroneous instruction was or was not harmless error. Cause was presumed. As a result, the petition was framed to meet these requirements, and the subject of actual innocence did not come up.

2. The district court's analysis was based upon harmless error. The Government conceded that the use instruction was incorrect after Bailey. Cause was presumed. Because actual innocence was not perceived as an issue, it was not addressed in the district court.

3. At the time of the appeal, Sixth Circuit precedent had not changed. As a result, the appeal was framed in terms of arguing that the erroneous jury instruction was not harmless.

The Government did not argue waiver, and its brief focused on the scope of the Certificate of Appealability and upon its argument that the district judge's harmless error analysis was correct.

4. The Sixth Circuit affirmed the district court, using a Bousley analysis, but still presuming cause in a jury trial scenario.

5. This analysis focused on whether the petitioner had shown actual prejudice. Even though the evidence against him was circumstantial, the Sixth Circuit concluded that a properly instructed jury would still have found him guilty. Since there was no prejudice, the Court concluded that the procedural default had not been overcome.

6. The Court also addressed actual innocence. Even though the petitioner had not been given an opportunity to make a showing of his actual innocence and even though Bousley had remanded to afford Bousley the opportunity of making such a showing, the Sixth Circuit used the circumstantial evidence to conclude that the petitioner was not actually innocent.

The Petitioner submits that this decision was inconsistent with Bousley, particularly given that unlike the cases cited supra, there was no direct and compelling evidence of the petitioner's guilt.

The Petitioner respectfully suggests that one of two remedies would be appropriate:

1. This Court could grant certiorari to address the fact that Circuit Courts are seemingly granting actual innocence hearings in guilty plea cases because of Bousley, but denying them in jury cases. This Court's opinion in Bousley did not indicate that persons who entered guilty pleas should be favored over individuals who went to trial.

2. Alternatively, this Court, on the authority of

Bousley, could exercise its "GVR" authority by granting the petition, vacating the Sixth Circuit order, and remanding to the district court for an actual innocence hearing. Cf., Lawrence v. Chater, 516 U.S. 163 (1996) (discussing this Court's "GVR" practice).

CONCLUSION

The petitioner is respectfully asking this Court to grant certiorari so that a split among the Circuits regarding the scope of this Court's decision in Bousley v. United States, 523 U.S. 614 (1998) can be addressed. In addition, the petitioner is respectfully asking this Court to grant certiorari to address his claimed violation of his Sixth Amendment rights when the Sixth Circuit substituted itself for the jury and rendered a hypothetical verdict. As an alternative, the petitioner is respectfully asking this Court to grant certiorari to address the applicability of Bousley to cases which are pending or whose defining events occurred prior to Bousley. Finally, the petitioner is asking this Court to grant certiorari to address the pattern in the Courts of Appeals of granting an actual innocence hearing re: Bailey to individuals who entered guilty pleas and denying such hearings to individuals who were convicted by a jury. Alternatively, as to this final issue, the petitioner is asking this Court to exercise its "GVR" authority and to remand this case for an actual innocence hearing.

Respectfully submitted,

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed December 29, 1998]

No. 97-1364

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

DAVID JAMES QUIGLEY,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

OPINION

Before: JONES and COLE, Circuit Judges, and

Opinion, 12/29/98

O'MALLEY, District Judge.*

R. GUY COLE, JR., Circuit Judge. Petitioner David Quigley filed a motion pursuant to 28 U.S.C. § 2255 to vacate his conviction and sentence under 18 U.S.C. § 924 (c). The district court, finding that Quigley's claims were without merit, denied the motion. On appeal Quigley raises three claims. First, he argues that based on the Supreme Court's decision in *Bailey v. United States,* 516 U.S. 137 (1995), there was insufficient evidence to support his conviction. Additionally, he contends that the jury's verdict was not based on a constitutionally valid instruction. Finally, he argues that his Sixth Amendment rights were violated because the court admitted his co-defendant's confession. For the following reasons we **AFFIRM** the district court's denial of Quigley's § 2255 motion.

BACKGROUND

When he was nineteen, Quigley, along with several individuals, participated in a series of pipe bombings in Marshall, Michigan. One of their first targets was a cooking grill at a public park. Less than two weeks later, Quigley and another co-conspirator destroyed a station wagon used to transport mail. This bombing was followed by the destruction of a van. No one was hurt during these bombings except Quigley himself when one of the bombs exploded in his hand on July 26, 1991, causing various injuries to his arm and face.

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* The Honorable Kathleen M. O'Malley, United States District Judge for the Northern District of Ohio, sitting by designation.

Soon after this mishap, Quigley fled to Mississippi where he was apprehended.

After Quigley was transferred back to Michigan, a grand jury returned a ten count indictment charging him with various crimes. Following a jury trial, he was convicted of Counts one through nine of the Indictment. At issue here is Quigley's conviction and mandatory thirty-year sentence under 18 USC. § 924(c).[1] Quigley's § 2255 motion raised three claims regarding his § 924(c) conviction. First, he claimed that there was insufficient evidence supporting his conviction for the July 15, 1991 bombing of the station wagon. Quigley argued that there were no eyewitnesses to that bombing and that any evidence connecting him to it was purely circumstantial. Additionally, Quigley claimed that, based on the Supreme Court's decision in *Bailey v. United States,* 516 U.S. 137 (1995), the jury instruction regarding the

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[1] Section 924(c) provides:

Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if a machinegun, or destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. 18 USC. § 924(c).

§ 924(c) charge was erroneous. Finally, Quigley claimed that his Sixth Amendment right was violated because of the admission of his co-defendant's confession against him. Though it denied Quigley's § 2255 motion, the district court issued a certificate of appealability for his second claim challenging the constitutionality of the jury instruction. However, the district court, and later this court, refused to grant leave to appeal with respect to Quigley's sufficiency and Sixth Amendment claims.

ANALYSIS

I. Quigley's Sufficiency Claim and Sixth Amendment Claim

Title 28 U.S.C. § 2253(c)(1)(B) provides that an appellate court lacks jurisdiction to hear an appeal from a denial of a § 2255 motion unless a judge has issued a certificate of appealability. Furthermore, any certificate of appealability issued by a judge must specify which issues may be reviewed on appeal. *See* 28 U.S.C. § 2253 (c)(3). The district court, as well as this court, denied a certificate of appealability with respect to either Quigley's sufficiency of evidence claim or his Sixth Amendment claim. Because Quigley has failed to obtain a certificate, neither issue may be reviewed by this court. *See Maggio v. Williams,* 464 U.S. 46, 47 (1983); *McCarthy v. Harper,* 449 U.S. 1309, 1310 (1981).

II. Jury Instruction

The district court granted, however, a certificate with regard to Quigley's jury instruction claim. Quigley claims that in light of *Bailey* the district court erred by instructing the

jury that in order to convict him under § 924(c), it need not find that he actually carried the destructive device. All that was required, the district court explained, was a showing that Quigley had possession of the bomb. But, in *Bailey,* the Supreme Court held that for a defendant to be convicted under § 924(c) there must be sufficient evidence establishing that the defendant actively employed a firearm during the predicate offense. See 516 U.S. at 150. It is not enough, the Court continued, for a firearm to be present during the offense. *See id.* at 149.

Though his argument that the jury instruction was erroneous in light of *Bailey* has merit, Quigley is precluded from raising it in this § 2255 motion because he failed to raise this challenge in his direct appeal. *See Bousley v. United States,* 118 S.Ct. 1604, 1607 (1998). Quigley may overcome this procedural bar if he demonstrates cause for his failure to raise the claim on direct appeal and that he suffered actual prejudice from the erroneous instruction. *See Murray v. Carrier,* 477 U.S. 478, 489 (1996). Alternatively, Quigley may pursue the defaulted claim if he shows that he is actually innocent of the crime. *See id.* at 496. He has failed to make either showing.

Novelty of a claim may serve as cause for a defendant's failure to raise a challenge prior to filing a § 2255 motion. *See Reed v. Ross,* 468 U.S. 1, 16 (1984). If the challenge is so novel that its legal basis is not reasonably available to counsel, a defendant may be excused from failing to raise it on direct appeal. *See id.* Considering that *Bailey* was decided after Quigley's direct appeal, the novelty of its holding provides cause for his failure to challenge the jury instruction. Quigley has failed to establish, however, actual

prejudice resulting from the defective jury instruction. *See Murray,* 477 U.S. at 489. Even if the jury had been properly instructed regarding *Bailey's* definition of "use," there is sufficient evidence to support its decision that Quigley actively employed a firearm or destructive device during the predicate offense--destruction of the station wagon. *See Bailey,* 516 U.S. at 143. For example, Quigley was at the scene of the bombing shortly before it occurred. Moreover, the materials used to construct the bomb that destroyed the station wagon were similar to the materials used to assemble other bombs Quigley made. Finally, while he was in Mississippi, Quigley admitted that he was involved in a series of bombings that occurred in Michigan. Considering these facts, a jury would more than likely have concluded that Quigley used a destructive device even under the *Bailey* definition of "use." Thus, Quigley has failed to establish that he suffered actual prejudice because the jury was not properly instructed.

Quigley has also failed to establish actual innocence. Though, as Quigley argues, there were no eyewitnesses to the bombing of the station wagon, evidence supports the jury's conclusion that he committed the bombing. He was at the scene shortly before it occurred and the materials used to construct his prior bombs were substantially similar to those used for the device. Even if circumstantial, this evidence is still dispositive of Quigley's guilt. Because Quigley has failed to provide evidence demonstrating that he was not involved in the bombing, his challenge to the jury instruction is procedurally barred.

CONCLUSION

For the foregoing reasons we **AFFIRM** the district court's denial of Quigley's § 2255 motion to vacate his sentence and conviction.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed March 14, 1997]

Case No. 1:191 CR 146

UNITED STATES OF AMERICA,
Respondent,

v.

DAVID JAMES QUIGLEY,
Movant.

FINAL ORDER

In accordance with the Court's Opinion of this date;

IT IS HEREBY ORDERED that the movant's motion for relief under Title 28 United States Code Section 2255 (dkt. # 104) is **DENIED**.

IT IS FURTHER ORDERED that, in accordance with Title 28 United States Code Section 2253(c)(3), the Court certifies appealability with respect to the issue of whether errant jury instructions with respect to the count 5 (for violation of 18 U.S.C. Sections 2 and 924(c)) constituted

harmless error. See Lyons v. Ohio Adult Parole Authority, 105 F.3d 1063 (6th Cir. 1997); Barefoot v. Estelle, 464 U.S. 880, 893-4 (1983). Otherwise, the Court determines that the motion raises issues (i.e., the sufficiency of the evidence and the Bruton challenge) not warranting appellate review.

Dated in Kalamazoo, MI: March 14, 1997

/s/_____
RICHARD ALAN ENSLEN
Chief Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed March 14, 1997]

Case No. 1:191 CR 146

UNITED STATES OF AMERICA,
Respondent,

v.

DAVID JAMES QUIGLEY,
Movant.

OPINION

Movant David James Quigley has filed a motion under 28 United States Code Section 2255 for relief from his conviction for violation of Title 18 United States Code Sections 2 and 924(c). Specifically, the movant was convicted of count 5 of the indictment against him--for aiding and abetting the use and carrying of a bomb in relation to a crime of violence (the predicate offense being the destruction of a van in Marshall, Michigan on July 15, 1991). He now challenges his conviction for, among other reasons, that the jury instructions on this charge failed to accurately define the terms "use" and "carry" as later made clear in Bailey v.

United States, 116 S.Ct. 501 (U.S. 1995) and United States v. Moore, 76 F.3d 111 (6th Cir. 1996).

First of all, it is true that the jury instructions used in Quigley's trial were mistaken. This point is conceded by the Government. Nevertheless, Quigley's conviction of the Section 924(c) offense need not be overturned if the error in instructions was harmless. California v. Roy, 117 S.Ct. 337, 338 (1996). Errant jury instructions defining the crime of conviction are deemed harmless if a rational jury would have necessarily returned a verdict of guilty based on proper instructions. Roy supra; Carella v. California, 491 U.S. 263, 267 (1988); see also United States v. Taylor, 102 F.3d 767, 771 (6th Cir. 1996); United States v. Moore, 76 F.3d 111, 113 (6th Cir. 1996).

In this case, the jury found based on proper instructions that the defendant was guilty, beyond a reasonable doubt, as to closely related counts. Specifically, it found that the defendant aided and abetted in the manufacture of the bomb in question. It also found that the defendant aided and abetted in the predicate offense (destruction of the van). Since there was no evidence at trial to suggest that the predicate offense was committed in some way other than the use of that bomb (i.e., all the evidence at trial suggested that the bomb destroyed the van), the jury must have necessarily found that the defendant aided and abetted in the use (active employment) of the bomb to commit the predicate offense. Therefore, the instructions did not cause any substantial or injurious effect upon the jury's verdict.[1] Accordingly,

[1] The same logic applies to the carrying prong since it was clear from the jury's findings that they determined that Holdridge

defendant is not entitled to relief from his conviction because of the harmless nature of the error. See Taylor, supra; United States v. Lopez, -- F.3d --, 1996 W.L. 708606, 5-6 (9th Cir. 1996).

Second, the movant argues that the evidence of his guilt as to count 5 is insufficient to support a conviction under the Due Process Clause. See Jackson v. Virginia, 443 U.S. 307 (1979); United States v. Evans, 883 F.2d 496, 501 (6th Cir. 1989).

The evidence at trial included: expert testimony that Quigley manufactured other bombs which were similar to the July 15 bomb; the testimony of Quigley's girlfriend (Michelle Connelly) that Quigley was at the explosion site at the time of the explosion; the testimony of Tammy Dunning and Dale White of Mississippi that Quigley told them that he was fleeing Michigan because he had made and detonated pipe bombs in cars there; and testimony of White and a deputy sheriff that Quigley had admitted to them how he manufactured the bombs. In light of such evidence, and the other evidence adduced at trial, the evidence is constitutionally sufficient to permit Quigley's conviction of count 5.

Third, the movant challenges his conviction of count 5 based on the holding in Bruton v. United States, 391 U.S. 123 (1968)--which held that the Sixth Amendment forbids the use of a co-defendant's confession to bolster the government's case against a defendant. This argument is problematic for

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and Quigley had carried the bomb to the van so as to destroy it.

two separate reasons: First, since it was not raised at trial or on direct appeal, the Bruton objection has been waived. United States v. Merida, 985 F.2d 198 (5th Cir. 1993). Although ineffective counsel may constitute cause for this failure (see, United States v. Ratliff, 999 F.2d 1023, 1026 (6th Cir. 1993)), there is little more than the defendant's assertion of ineffectiveness to support this contention. Since it appears more likely that a failure to raise such an objection was a deliberate strategy on the part of counsel to not alienate the jury and to accept the Court's limiting instructions, this Court cannot simply assume that the waiver was unintentional and constituted ineffective assistance. See, Strickland v. Washington, 466 U.S. 668, 686-9 (1984). Second, even assuming cause for the failure to raise the objection, the objection itself lacks merit. The only statement at trial like the statements impermissible under Bruton was a statement of Michelle Connelly that Brandy Milne had told her that "they" had done the bombings. This statement was admitted for a nonhearsay purpose and a limiting instruction was given to the jury to prevent its use for a hearsay purpose. Under such circumstances, the Sixth Circuit Court of Appeals has previously said that a defendant's Sixth Amendment rights are not violated. United States v. Sherlin, 67 F.3d 1208 (6th Cir. 1995). Therefore, the holding in Bruton does not require relief in this case.

In light of these findings, the Court concludes, pursuant to Rule 8 of the Rules Governing Section 2255 Cases in the United States District Courts, that the movant is not entitled to relief under 28 United States Code Section 2255. An order shall enter denying the motion.

Dated in Kalamazoo, MI: March 14, 1997

/s/_____
RICHARD ALLEN ENSLEN
Chief Judge

APPENDIX D

UNITED STATES OF AMERICA IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

[Filed November 14, 1991]

UNITED STATES OF AMERICA, Plaintiff,	)
v.	)
MICHAEL KELLY HOLDRIDGE, DAVID JAMES QUIGLEY, AND TROY JOHN ZOUCHA, Defendants.	)

INDICTMENT

The Grand Jury charges:

COUNT 1

From at least in or about May, 1991, through at least on or about July 31, 1991, in Calhoun County, in the Southern Division of the Western District of Michigan, and elsewhere,

MICHAEL KELLY HOLDRIDGE,
DAVID JAMES QUIGLEY, and
TROY JOHN ZOUCHA

knowingly and intentionally did combine, conspire, confederate, and agree with each other and with others to commit an offense against the United States by violating one or more of the following: 26 U.S.C.§§ 5861(f) and 5861(d), by making, possessing, and detonating unregistered destructive devices (pipe bombs).

It was a part of said conspiracy that defendants did form an agreement to assemble pipe bombs with timing devices and/or fuses, place them under motor vehicles, and cause them to be detonated for the purpose of damaging or destroying such motor vehicles.

In furtherance of said conspiracy and to effect the objects thereof, the defendants and co-conspirators performed the following overt acts in the Southern Division of the Western District of Michigan, and elsewhere:

1. Between in or about May, 1991 and July, 1991, DAVID JAMES QUIGLEY purchased or procured approximately one pound of black powder, a length of two inch diameter pipe, end caps, light bulbs, an alarm clock, batteries, and electrical wire, and other materials used in the construction of pipe bombs.

2. On or about July 4, 1991, at Ketchum Park, in or near Marshall, Calhoun County, Michigan, MICHAEL KELLY HOLDRIDGE and DAVID JAMES QUIGLEY detonated a small destructive device, resulting in damage to

a grill.

3. On or about July 13, 1991, MICHAEL KELLY HOLDRIDGE purchased or procured solder, light bulbs, and other materials used in the construction of pipe bombs.

4. On or about July 14-15, 1991, MICHAEL KELLY HOLDRIDGE and DAVID JAMES QUIGLEY made a pipe bomb at or near Albion, Michigan which pipe bomb was not registered to either of them in the National Firearms Registration and Transfer Record.

5. On or about July 15, 1991, MICHAEL KELLY HOLDRIDGE and DAVID JAMES QUIGLEY placed and aided and abetted in the placement of this pipe bomb underneath a 1977 Ford station wagon van owned by Lawrence Brooks Hughes and parked in a parking lot behind 310 East Michigan Avenue, Marshall, Michigan.

6. At approximately 1:07 a.m. on that date, said pipe bomb detonated, resulting in the combustion and destruction of said van.

7. On or about July 22-23, 1991, MICHAEL KELLY HOLDRIDGE and DAVID JAMES QUIGLEY made a pipe bomb at or near Albion, Michigan which pipe bomb was not registered to either of them in the National Firearms Registration and Transfer Record.

8. On or about July 23, 1991, in Marshall, Michigan, MICHAEL KELLY HOLDRIDGE and DAVID JAMES QUIGLEY placed and aided and abetted in the placement of this pipe bomb underneath a 1989 Plymouth Voyager van,

registered to Thomas J. Birmingham and parked in a city parking lot at the corner of North Jefferson and West Mansion Streets.

9. At approximately 1:05 a.m. on that date, said pipe bomb detonated, resulting in the combustion and destruction of said Plymouth Voyager van.

10. On or about July 25-26, 1991, DAVID JAMES QUIGLEY made a pipe bomb at 26328 L Drive North, in or near Albion, Calhoun County, Michigan, which pipe bomb was not registered to him in the National Firearms Registration and Transfer Record.

11. On or about July 26, 1991, at said location DAVID JAMES QUIGLEY picked up this pipe bomb to transport it in order to detonate it, whereupon said pipe bomb detonated, resulting in combustion and damages to the residence of William and Lynda Quigley and personal injuries to DAVID JAMES QUIGLEY.

12. On or about July 26, 1991, at said location, MICHAEL KELLY HOLDRIDGE collected and concealed from the law enforcement authorities the remaining materials which he and DAVID JAMES QUIGLEY had been using to make pipe bombs.

13. On or about July 27, 1991, at or near Albion, Michigan, MICHAEL KELLY HOLDRIDGE and TROY JOHN ZOUCHA retrieved these materials, eventually taking them to Jackson County, Michigan.

14. On or about July 29, 1991, MICHAEL KELLY

HOLDRIDGE and TROY JOHN ZOUCHA discussed and agreed to manufacture, possess, place, and detonate a destructive device (pipe bomb).in an attempt to deceive law enforcement authorities concerning the involvement of DAVID JAMES QUIGLEY in the previous pipe bombings.

15. On or about July 29, 1991, in or near Parma, Michigan, MICHAEL KELLY HOLDRIDGE and TROY JOHN ZOUCHA manufactured an unregistered pipe bomb and attached a timing device, after which TROY JOHN ZOUCHA transported MICHAEL KELLY HOLDRIDGE, Brandy Danyuel Milne, and the device to the vicinity of Marshall, Michigan where MICHAEL KELLY HOLDRIDGE set the timing device and placed the pipe bomb underneath a van on River Road.

16. On or about July 30, 1991, MICHAEL KELLY HOLDRIDGE and TROY JOHN ZOUCHA discovered that the pipe bomb had failed to detonate and retrieved the device from underneath the van for future use.

17. On or about July 31, 1991, in the early morning hours, in or near Marshall, Michigan, TROY JOHN ZOUCHA drove MICHAEL KELLY HOLDRIDGE and the pipe bomb, together with Brandy Danyuel Milne and Michelle Renee Conley to the site of the van on River Road and then, at MICHAEL KELLY HOLDRIDGE's direction, to the vicinity of a residence on Warren Street in said city, where MICHAEL KELLY HOLDRIDGE placed the pipe bomb underneath a 1980 Plymouth sedan registered to Judith Ann Leach, after which they departed.

18. At approximately 1:39 a.m., on or about July 31,

1991, the pipe bomb detonated, resulting in damage to the sedan.

18 U.S.C. § 371

COUNT 2

On or about July 14, 1991, in or near Albion, Calhoun County, in the Southern Division of the Western District of Michigan,

MICHAEL KELLY HOLDRIDGE,
and
DAVID JAMES QUIGLEY

knowingly did make and aid and abet in the making of a firearm, that is, a destructive device, in the form of a pipe bomb, in violation of the provisions of Chapter 53 of Title 26 of the United States Code, specifically 26 U.S.C. § 5822, in that they did manufacture and put together a pipe bomb, without having filed a written application, paid the tax, identified the firearm and themselves, and obtained approval, as required by 26 U.S.C. § 5822.

26 U.S.C. § 5861 (f)
26 U.S.C. § 5871
26 U.S.C. § 5845
26 U.S.C. § 5822
18 U.S.C. § 2

COUNT 3

From on or about July 14, 1991 through on or about July 15, 1991, in or near Marshall, Calhoun County, in the Southern Division of the Western District of Michigan,

MICHAEL KELLY HOLDRIDGE,
and
DAVID JAMES QUIGLEY

knowingly did possess and aid and abet in the possession of a firearm, that is, a destructive device, in the form of a pipe bomb, which was not registered to either of them in the National Firearms Registration and Transfer Record.

26 U.S.C. § 5861 (d)
26 U.S.C. § 5871
26 U.S.C. § 5845
18 U.S.C. § 2

COUNT 4

On or about July 15, 1991, in or near Marshall, Calhoun County, in the Southern Division of the Western District of Michigan,

MICHAEL KELLY HOLDRIDGE,
and
DAVID JAMES QUIGLEY

maliciously damaged and destroyed and attempted to damage and destroy by means of an explosive and resultant fire a vehicle used in an activity affecting interstate and foreign

commerce, in that they did then and there place and cause the detonation and aid and abet in the placement and causing of the detonation by means of a destructive device (pipe bomb) of a 1977 Ford station wagon van used by Brooks Lettershop to transport literature from the business to the United States Post Office for interstate mailing, by Brooks Rupture Appliance to transport trusses and related devices to the United States Post Office for interstate and foreign mailing, and by both businesses to transport mail from the United States Post Office to the place of business.

18 U.S.C. § 844 (i)
18 U.S.C. § 841
18 U.S.C. § 2

COUNT 5

On or about July 15, 1991, in or near Marshall, Calhoun County, in the Southern Division of the Western District of Michigan,

MICHAEL KELLY HOLDRIDGE,
and
DAVID JAMES QUIGLEY,

during and in relation to a crime of violence for which they may be prosecuted in a court of the United States, knowingly did use and carry and aid and abet in the use and carrying of a firearm, that is, a destructive device in the form of a pipe bomb, in that during and in relation to their malicious damage and destruction by means of an explosive of a vehicle used in an activity affecting interstate or foreign commerce, that is, a 1977 Ford station wagon van used to transport mail and

materials in the conduct of interstate and foreign business activities, in violation of 18 U.S.C. § 844(i), defendants possessed and had under their control an unregistered destructive device (pipe bomb).

18 U.S.C. § 924 (c)
18 U.S.C. § 921
18 U.S.C. § 2

COUNT 6

On or about July 22, 1991, in or near Albion, Calhoun. County, in the Southern Division of the Western District of Michigan,

MICHAEL KELLY HOLDRIDGE,
and
DAVID JAMES QUIGLEY

knowingly did make and aid and abet in the making of a firearm, that is, a destructive device in the form of a pipe bomb, in violation of the provisions of Chapter 53 of Title 26 of the United States Code, specifically 26 U.S.C. § 5822, in that they did manufacture and put together a pipe bomb, without having filed a written application, paid the tax, identified the firearm and themselves, and obtained approval, as required by 26 U.S.C. § 5822.

26 U.S.C. § 5861 (f)
26 U.S.C. § 5871
26 U.S.C. § 5845
26 U.S.C. § 5822
18 U.S.C. § 2

COUNT 7

From on or about July 22, 1991 through on or about July 23, 1991, in or near Marshall, Calhoun County, in the Southern Division of the Western District of Michigan,

MICHAEL KELLY HOLDRIDGE,
and
DAVID JAMES QUIGLEY

knowingly did possess and aid and abet in the possession of a firearm, that is, a destructive device in the form of a pipe bomb, which was not registered to either of them in the National Firearms Registration and Transfer Record.

26 U.S.C. § 5861 (d)
26 U.S.C. § 5871
26 U.S.C. § 5845
18 U.S.C. § 2

COUNT 8

On or about July 25, 1991, in or near Albion, Calhoun County, in the Southern Division of the Western District of Michigan,

DAVID JAMES QUIGLEY

knowingly did make a firearm, that is, a destructive device in the form of a pipe bomb, in violation of the provisions of Chapter 53 of Title 26 of the United States Code, specifically 26 U.S.C. § 5822, in that he did manufacture and put together a pipe bomb, without having filed a written application, paid the tax, identified the firearm and himself, and obtained

approval, as required by 26 U.S.C. § 5822.

26 U.S.C. § 5861 (f)
26 U.S.C. § 5871
26 U.S.C. § 5845
26 U.S.C. § 5822

COUNT 9

From on or about July 25, 1991 through on or about July 26, 1991, in or near Albion, Calhoun County, in the Southern Division of the Western District of Michigan,

DAVID JAMES QUIGLEY

knowingly did possess a firearm, that is, a destructive device in the form of a pipe bomb, which was not registered to him in the National Firearms Registration and Transfer Record.

26 U.S.C. § 5861 (d)
26 U.S.C. § 5871
26 U.S.C. § 5845

COUNT 10

From on or about July 29, 1991 through on or about July 31, 1991, in or near Marshall, Calhoun County, An the Southern Division of the Western District of Michigan,

MICHAEL KELLY HOLDRIDGE
and
TROY JOHN ZOUCHA

knowingly did possess and aid and abet in the possession of a firearm, that is, a destructive device in the form of a pipe bomb, which was not registered to either of them in the National Firearms Registration and Transfer Record.

26 U.S.C. § 5861 (d)
26 U.S.C. § 5871
26 U.S.C. § 5845
18 U.S.C. § 2

APPENDIX E

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

18 U.S.C. 924 (c)

Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime be sentenced to imprisonment for five years, and if the weapon is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and, if a machinegun, or destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years.

28 U.S.C. § 2255

An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. (June 25, 1948, ch 646, § 1, 62 Stat. 967; May 24, 1949, ch 139, § 114, 63 Stat. 105.)

APPENDIX F

JURY INSTRUCTIONS

The following charge was given to the jury with respect to Count 5:

> Count 5 of the indictment is a charge against both defendants and affects the date of July 15, and Marshall or the area near Marshall. It charges them both with using or carrying a firearm, during or in relation to a crime of violence, in connection with section 924 (c) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements--and once again there are three--beyond a reasonable doubt:
>
> First, that on or about the date charged, the defendant was carrying or used a firearm;
>
> Secondly, that the defendant had knowledge that what he was carrying or using was a firearm;
>
> An thirdly, that the defendant did so during the commission of the crime charged in Count 4, that is the count just before Count 5 involving the vehicle on July 15, that the defendant did so during the commission of the crime charged in count 4 of the indictment, that is to say, the crime of maliciously damaging and destroying by means of an explosive and resultant fire a vehicle used in an activity affecting

interstate and foreign commerce.

The first element that the government must prove beyond a reasonable doubt is that the defendant was carrying or used a firearm. A firearm under the statute upon which Count 5 is based means, quote: "Any weapon which will or is designed to, or may readily be converted to, expel a projectile by the action of an explosive." End quote.

If you find that the defendant did not carry or use a firearm, or if you have a reasonable doubt as to this element, it is your duty to acquit the defendant on this count.

In order to satisfy this element, the government must prove beyond a reasonable doubt is that the defendant had knowledge that what he was carrying or using was a firearm as that term is generally used.

An act is done knowingly if done purposely and voluntarily, and as opposed to mistakingly or accidently. In order for the government to satisfy this element, it must prove that the defendant knew what he was doing, for example, that he was carrying a gun without having a license. It is not necessary, however, for the government to prove that the defendant knew that he was violating any particular law.

The term "crime of violence" as used in the count means an offense that is a felony and has as one of its essential elements the use, attempted use, or

> threatened us of physical force against the person or property of another, or an offense that by its very nature involves a substantial risk that such physical force may be used in committing the offense.

As to count 3, the Court stated that the Government must prove that the defendant possessed the firearm, that the defendant knew that what he possessed was a firearm, and that the firearm was not registered. As to count 2, the Court instructed that the Government must prove that the defendant made a firearm, that the defendant knew he was making a firearm, and that the defendant did not file a written application with respect to registration, identification, taxes, or approval. As to count 4, the court instructed that the Government must prove that the appellant used an explosive to destroy or to attempt to destroy property, that the property was used in interstate commerce, and that the appellant acted maliciously.

The Court also gave a Pinkerton-type instruction regarding the responsibility of conspirators for the acts of other members of the conspiracy:

> A conspirator is responsible for offenses committed by his fellow conspirators if he were a member of the conspiracy when the offense was committed, and if the offense was committed in furthermore of or as a natural consequence of the conspiracy.

Finally, the Court instructed that a defendant can be found guilty "if he intentionally helped or encouraged some else to commit the crime. A person who does this is called in

the law an aider and abettor . . . .what the government must prove is that the defendant did something to help or encourage the crime with the intent that the crime should be committed".

APPENDIX G

1998 U.S. App. LEXIS 20144 printed in FULL format.

Bobby G. Rost, Appellant v. United States of America, Appellee

No. 97-2540

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

1998 U.S. App. LEXIS 20144

August 7, 1998, Submitted

August 17, 1998, Filed

NOTICE: [*1] RULES OF THE EIGHTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in *Table Case Format at 1998 U.S. App. LEXIS 34794.*

PRIOR HISTORY: Appeal from the United States District Court for the Western District of Missouri.

DISPOSITION: Affirmed.

COUNSEL: BOBBY G. ROST, Movant-Appellant, Pro se, FEDERAL CORRECTIONAL INSTITUTION, El Reno, OK.

For UNITED STATES OF AMERICA, Defendant - Appellee: Cynthia Jean Hyde, David P. Rush, U.S. ATTORNEY'S OFFICE, Springfield, MO.

JUDGES: Before WOLLMAN, HANSEN, and MURPHY, Circuit Judges.

OPINION:
PER CURIAM.

Bobby G. Rost appeals from the district courts n1 denial of his motion under *28 U.S.C. § 2255.* We affirm.

n1 The Honorable Russell G. Clark, United States District Judge for the Western District of Missouri.

Rost was convicted of a number of offenses, including the use and carrying of a firearm in relation to drug offenses, in violation of *18 U.S.C. § 924(c).* The district court imposed a 60-month prison sentence on the weapon charge, consecutive [*2] to the prison sentence he received on the other charges. After an unsuccessful direct criminal appeal, see *United States v. Rost, 1994 U.S. App. LEXIS 10357, No. 93-3972, 1994 WL 175911* (8th Cir. May 11, 1994) (unpublished per curiam); *United States v. Akers, 987 F.2d 507 (8th Cir. 1993),* Rost brought this section 2255 motion challenging, under *Bailey v. United States, 516 U.S. 137, 133 L. Ed. 2d 472, 116 S. Ct. 501 (1995),* the section 924 (c) jury instruction given at his trial.

We note that Rost procedurally defaulted this claim by failing to object at trial and to raise the issue on direct appeal. See *Velasquez v. United States, 131 F.3d 766, 766-67 (8th Cir. 1997)* (per curiam). After careful review of the record and the parties briefs, we conclude that Rost has not established that with appropriate instructions and "in light of all the evidence it is more likely than not that no reasonable juror would have convicted him." See *Bousley v. United States, 140 L. Ed. 2d 828, 118 S.Ct. 1604, 1611 (1998)* (internal quotations omitted). We therefore affirm the decision of the district court. See *118 S. Ct. at 1610-12, 1998 U.S. LEXIS 3334,* *22 (concluding petitioner must establish "actual innocence" where no cause existed for his procedural default).

The judgment is affirmed. [*3]

Unpublished Cases

1998 U.S. App. LEXIS 31875 printed in FULL format.

UNITED STATES OF AMERICA, Plaintiff-Appellee,
v. HENRICO BAUTISTA DE LA CRUZ,
Defendant-Appellant

No. 98-55792

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

1998 U.S. App. LEXIS 31875

December 14, 1998 n2, Submitted

n2 The panel unanimously finds this case suitable for decision without oral argument, See Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

December 17, 1998, Filed

NOTICE: [*1] RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court of the Southern District of California. D.C. No. CV-97-00719-NAJ, CR-95-00615-NAJ. Napoleon A. Jones, District Judge, Presiding.

DISPOSITION: AFFIRMED.

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff-Appellee: Randy K. Jones, AUSA, Michael E. Lasater, Esq., USSD - OFFICE OF THE U.S. ATTORNEY, San Diego, CA.

For HENRICO BAUTISTA DE LA CRUZ, Defendant - Appellant: Glorene M. Franco, Esq., FEDERAL DEFENDERS OF SAN DIEGO, San Diego, CA.

JUDGES: Before: BROWNING, TROTT, and SIVERMAN, Circuit Judges.

OPINION: MEMORANDUM n1

> n1 This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Federal prisoner Henrico Bautista De La Cruz appeals the district court's denial of his *28 U.S.C. § 2255* motion challenging his 69-month [*2] sentence imposed following a jury trial conviction for involuntary manslaughter and use of a firearm, in violation of *18 U.S.C. §§ 1112,* 924(c), and 924(j)(2). We have jurisdiction pursuant to *28 U.S.C. § 2253.* We review a district court's denial of a section *2255* motion de novo, see *United States v. Pirro, 104 F.3d 297, 299 (9th Cir. 1996),* and we affirm.

De La Cruz contends that the district court erred by imposing a 60-month sentence for the use of a firearm pursuant to *18 U.S.C. § 924*(c)(1), consecutive to the sentence imposed for involuntary manslaughter.

This claim is procedurally defaulted because De La Cruz failed to raise it on direct appeal. See *Bousley v. United*

States, 140 L. Ed. 2d 828, 118 S. Ct. 1604, 1611 (1998).

AFFIRMED.

1994 U.S. App. LEXIS 20285 printed in FULL format.

UNITED STATES OF AMERICA, Plaintiff-Appellant; v. DAVID JAMES QUIGLEY, Defendant-Appellee.

No. 93-1429; 93-1520

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

1994 U.S. App. LEXIS 20285

August 1, 1994, Filed

NOTICE: [*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

SUBSEQUENT HISTORY: Report in Table Case Format at: *30 F.3d 135, 1994 U.S. App. LEXIS 27226.* Certiorari Denied January 23, 1995, Report at: *1995 U.S. LEXIS 824.*

PRIOR HISTORY: ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN

DISTRICT OF MICHIGAN. District No. 91-00146. Enslen, District Judge.

JUDGES: BEFORE: JONES and SUHRHEINRICH, Circuit Judges, and ENGEL, Senior Circuit Judge.

OPINION BY: PER CURIAM

OPINION: PER CURIAM. In Case No. 93-1429, the United States challenges a judgment imposing sentence upon Defendant-Appellee David James Quigley, and in Case No. 93-1520, the United States challenges a judgment vacating the first sentence and reducing Quigley's term of imprisonment.

We DISMISS Case No. 93-1429 as moot. The government asks us to set aside Quigley's original February 16, 1993, sentence. We need not review this claim, for the district judge expressly withdrew that sentence and replaced it with a new one on March 8, 1993.

The sentencing issue in Case No. 93-1520 has been resolved by this court in a recent opinion dealing with Quigley's co-conspirator. [*2] See United States v. Holdridge, No. 92-1889 (unpublished per curiam). We therefore VACATE the sentence imposed on Quigley and REMAND for resentencing consistent with that opinion.

CONCUR BY: NATHANIEL R. JONES

CONCUR: NATHANIEL R. JONES, Circuit Judge, concurring. In Calhoun County, Michigan, beginning in May 1991, Quigley and his uncle Michael Holdridge conspired to make, possess, and detonate pipe bombs. Quigley was

nineteen years old at this time, and Holdridge was twenty-two.

At 1 a.m. on July 15, 1991, Quigley and Holdridge destroyed a 1977 Ford station wagon by placing a pipe bomb beneath it. On July 25, another bomb made by the duo unexpectedly detonated, blinding Quigley in one eye, severing a tendon in his finger, and causing severe burns. Quigley neither manufactured nor discharged any other bombs after that point, though Holdridge and a third party exploded another bomb in late July.

Because the owner of the vehicle that Quigley destroyed used it to transport products and correspondence between his business and the post office, Quigley was charged in federal court with malicious destruction by means of an explosive of a vehicle used in activity affecting interstate or foreign commerce, [*3] in violation of *18 U.S.C. § 844*(i). Quigley also was charged with a violation of *18 U.S.C. § 924*(c), which provides for a sentencing enhancement for using a destructive device during and in relation to a crime of violence. The latter statute carries with it a thirty-year mandatory consecutive sentence.

On April 20, 1992, a jury convicted Quigley on both counts. In the March 8, 1993, sentencing of Quigley, the district court considered the interplay of § 844(i) and § 924(c). See generally *United States v. Quigley, 816 F. Supp. 1217 (W.D. Mich. 1993)*. The court, therefore, imposed no § 924(c) sentence and ordered him sentenced to 48 months imprisonment, in addition to supervised release, restitution, and special assessments.

Unpublished Cases

In United States v. Holdridge, No. 92-1889, we recently held that the imposition of consecutive sentences under § 844(i) and § 924(c) does not violate the Double Jeopardy Clause. I dissented in that case and believe that applying multiple punishments under the two statutes violates the Double [*4] Jeopardy Clause, unless Congress were to clearly indicate that is wishes the bombing sentence enhancement to apply to enhance sentences for bombing offenses. Recognizing that Holdridge is now the law of the circuit, however, I concur in this decision.

I wish to note that this case provides yet another example of the grave injustice that can occur from the use of mandatory minimum sentences. I cannot believe that this teenager's 1 a.m. bombing of an unoccupied car was the sort of offense that members of Congress had in mind when they created § 924(c)'s thirty-year mandatory minimum for the use of a bomb in connection with a violent offense. Because Quigley, who had no criminal history, is unfortunate enough to have committed a crime that lumps him together with more dangerous and hardened criminals, he may well suffer the consequences of one-size-fits-all sentencing. See *United States v. Quigley, 798 F. Supp. 451, 458 (W.D. Mich. 1992)* ("One has to wonder whether it is wisdom or political pandering that leads Congress to sentence the taxpayers to paying for incarceration of a nineteen-year-old and a twenty-two-year-old for nearly the rest of their [*5] lives rather than imposing a severe, yet less draconian, penalty that would allow them the hope of returning to society as reformed individuals.").